(3)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

CRIMINAL APPEAL NO. 679 /2002

APPELLANTS	:	1. Tiharu S/o Dasharam Panika, aged 38 years, 2. Jugudas, S/o Dasharam Panika, aged 40 years, Both are R/o Tundri, Police Station Dabra, District Janjgir-Champa. (C.G.).
	-VERSUS-	
RESPONDENT	:	State of Chhattisgarh through Police Station Dabra, District Janjgir-Champa (C.G.)

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by Shri Indrajeet Sahu Advocate

R. to D.R. (J)
28/06

APPEAL U/S 374 (2) OF THE CODE OF CRIMINAL PROCEDURE

A.F.R.

HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR

Before : Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Criminal Appeal No. 679 of 2002.

Appellants : Tiharu & another

- Vs.-

Respondent : State of Chhattisgarh

Present: Shri Parag Kotecha, learned counsel for the appellants.
Shri U.K.S. Chandel, learned Panel Lawyer, for the State.

ORAL JUDGMENT
(~~Passed~~ Delivered on 9th March, 2006)

This appeal is directed against the Judgment dated 10-05-2002, delivered by Shri Yogesh Mathur, learned Additional Sessions Judge, Sakti, District Bilaspur in Session Case No.356 of 2001, whereby the appellants were convicted under Section 376 (2) (g) of the Indian Penal Code and were sentenced to undergo R.I. for 10 years and to pay a fine of Rs.1,000/-, each and in default of payment of fine to undergo additional R.I. for one year.

(2) Briefly stated prosecution story as revealed by the typed First Information Report – Ex.P/14 lodged by the prosecutrix on 18-07-2001 is that on the same day at about 8.00 a.m. while her husband was away from home and she was cleaning the courtyard of her house, the appellants herein along with co-accused Dasharam and Prem Das came there, started quarreling and assaulted her. Both the appellants herein pushed the prosecutrix on the ground and dragged her inside the house.

Appellant – Jugudas caught hold of the hands of the prosecutrix and appellant – Tiharu after removing her clothes and gagging her mouth with one hand and, committed rape on her. Dasharam and Prem Das stood guard outside the house. Sikandar aged about 10 years, son of the prosecutrix who was present inside the house ran away on being slapped by Jugudas. The prosecutrix informed the incident to Hemvati (P.W.5) and also to Budhram -Kotwar (P.W.6). The prosecutrix was sent for medical examination. Dr. Smt.Shashikala Miri (P.W.1) examined the prosecutrix on 20-07-2001 and found no marks of any injury either external or on her private parts. She opined that the prosecutrix was habitual of sexual intercourse. Accused – Tiharu was also examined by Dr. G.L. Miri (P.W.2) who found that he was capable of performing sexual intercourse.

(3) Seminal slide of appellant Tiharu, vaginal slide of the prosecutrix along with Saya, Kurri (undergarment) and Chaddi of the prosecutrix were sent for chemical analysis to the Forensic Science Laboratory. Presence of semen and human spermatozoa was confirmed only on the seminal slide of appellant Tiharu. After completion of investigation, the appellants along with co-accused Dasharam and Prem Das were prosecuted under Section 376 (2) (g) of the I.P.C. Both the appellants abjured the guilt and pleaded false implication due to enmity on account of property dispute and led no evidence in defence. The prosecution examined as many as 9 witnesses. The trial Judge relying upon the evidence of the prosecutrix convicted and sentenced the appellants as aforesaid in paragraph 1 while acquitting co-accused Dasharam and Prem Das.

(4) Shri Parag Kotecha, learned counsel appearing for the appellants contended that it clearly emerges from the testimony of the prosecutrix that there was a serious property dispute of the prosecutrix with the appellants. The testimony of Hemvati (P.W.5) left no room for any doubt that the appellants have been falsely implicated upon a false F.I.R. being lodged by the prosecutrix. The medical evidence of Dr. Shashikala Miri (P.W.1) as well as the report of F.S.L.- Ex.P/ 21 did not support the testimony of the prosecutrix that she was dragged, beaten by the appellants herein and then raped by the appellant Tiharu. Lastly, it was argued that Sikandar, aged about 10 years, son of the prosecutrix who was present at the time of the occurrence and was also cited by the prosecution as a witness, was given-up on 11-03-2002 by the prosecution without any rhyme or reason for which adverse inference ought to be drawn against the prosecution. On these premises, learned counsel contended that the conviction and sentence of the appellants deserves to be set aside. Reliance was placed on the Judgments in the cases of **Ballu Vs. State of M.P.**, reported in **2004 (5) M.P.H.T. 47 (NOC); Sanju alias Sanjay and another Vs. State of Madhya Pradesh,** reported in **2005(1) M.P.HT. 152** ; **Gulab Jharia Vs. State of M.P.,** reported in **2005 (2) M.P.H.T. 366** ; **Dilip and another Vs. State of M.P.**, reported in **AIR 2001 SC -3049;** and **Lakhan Singh Vs. State of M.P. and others,** reported in **2004 (2) M.P.H.T. 153.** On the other hand, Shri U.K.S. Chandel, learned Panel Lawyer has argued in support of the impugned Judgment.

(5) I have gone through the record of Sessions Case No. 356 of 2001 and considered the testimony of the prosecutrix (P.W.8) in the light of the arguments advanced by learned counsel for the appellants. The

testimony of the prosecutrix in para 3 that the appellants repeatedly dragged her on the floor of the courtyard and after assaulting her again dragged her inside the house and there were scratches on her breast is wholly unreliable because it does not find corroboration from the medical evidence of Dr. Shashikala Miri (P.W.1). If the prosecutrix was repeatedly dragged as narrated by her in para 3 and 25 of her testimony and assaulted by the appellants, presence of injuries on her body was a must. Her testimony that due to the ejaculation her Saya and Kurri were stained with the semen of appellant Tiharu also fails to inspire confidence because the report of the FSL –Ex.P/21 clearly negatives the presence of semen on the petticoat and other undergarments of the prosecutrix.

(6) Paragraphs 12 and 13 of the evidence of the prosecutrix clearly show that there is a serious property dispute going on between the prosecutrix and the appellants. Although in paragraph 36 of her testimony, the prosecutrix has stated that she had narrated the incident to Budhram – Kotwar (P.W.6), yet he did not depose any such fact. Hemvati (P.W.5) to whom the prosecutrix is alleged to have narrated the incident had an altogether different story to narrate. She has categorically stated in paragraph 3 of her testimony that the prosecutrix had told her that although no rape had been committed by the appellants on her, yet due to a serious property dispute she was going to lodge a false report against the appellants as she firmly believed that if the appellants would remain inside the jail there would be no further quarrel. This witness has further narrated that although she advised the prosecutrix against such an action, yet the prosecutrix did not pay any heed to her suggestion and went to lodge a false report. This fact also creates a serious dent in the testimony of the prosecutrix and renders it wholly unreliable.

(7) The prosecutrix in paragraph 5 clearly stated that her son Sikandar was present inside the house at the time of occurrence and co-accused Dasharam had also slapped him. Sikandar was not only cited by the prosecution as a witness, but was also present before the trial Court on 06-08-2001, 09-03-2002 and 11-03-2002, yet this material witness was given-up by the prosecution for no rhyme or reason. Non-examination of a material witness who had seen the quarrel immediately preceding the alleged rape justifies adverse inference against the prosecution and further weakens the truthfulness of the prosecutrix. It is settled law that the prosecutrix, in an offence of rape, is not accomplice and the conviction on the sole testimony of the prosecutrix is permissible provided her evidence inspires confidence and appears to be natural and truthful. In **Vimal Suresh Kamble v. Chaluverapinake Apal S.P. and another** reported in **2003 (3) S.C.C. 175,** since the evidence of the prosecutrix was not found to be of such quality and there was no other evidence on record which could even lend some assurance, short of corroboration that the prosecutrix was making a truthful statement, the acquittal of the appellant under Section 376 I.P.C. was upheld by the Apex Court.

(8) Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that the evidence of the prosecutrix fails to inspire confidence and the possibility that the appellants have been falsely implicated by the prosecutrix upon a property dispute cannot be ruled out. The aforesaid circumstances mentioned in paras 5 to 7 lead to an inference that the prosecutrix is not a reliable witness. Accordingly, I am of the considered opinion that the conviction

and sentence imposed upon the appellants under Section 376 (2) (g) of the I.P.C. cannot be sustained in the eye of law.

(9) In the result, the appeal is allowed. Appellants Tiharu and Jugudas are acquitted of the charge under Section 376 (2) (g) of the I.P.C. and shall be set at liberty forthwith, if not required in any other case. Fine amount, if paid, shall be refunded.

Sd/-
DILIP RAOSAHEB DESHMUKH
Judge